

IN THE SUPREME COURT OF MISSOURI

---

PC CONTRACTORS, INC.,  
Appellant/Cross-Respondent,

v.

J.E. DUNN CONSTRUCTION COMPANY and  
STARLIGHT THEATRE,  
Respondents/Cross-Appellants.

---

Transfer from the Missouri Court of Appeals,  
Western District

before

Paul M. Spinden, C.J., Robert G. Ulrich and Edwin H. Smith, J.J.

---

**SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT  
J.E. DUNN CONSTRUCTION COMPANY**

---

ORAL ARGUMENT REQUESTED

---

David R. Buchanan #29228  
Scott A. Hunter #46518  
**BROWN & JAMES, P.C.**  
1100 Main Street, Suite 1900  
Kansas City, Missouri 64105  
(816) 472-0800

Attorneys for Respondent/Cross-Appellant  
J.E. Dunn Construction Company

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS	6
POINTS RELIED ON	10
ARGUMENT	13
CROSS-APPEAL	29
CONCLUSION	35
CERTIFICATE OF COMPLIANCE AND SERVICE	37

## TABLE OF AUTHORITIES

### CASES

<i>Buchanan v. Rentenbach Constructors, Inc.,</i> 922 S.W.2d 467 (Mo. App. E.D. 1996).....	17-19
<i>Dillard v. Shaugnessy, Fickel &amp; Scott Architects, Inc.,</i> 884 S.W.2d 722 (Mo.App. W.D. 1994).....	16, 20
<i>ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,</i> 854 S.W.2d 371, 376 (Mo. banc 1993).....	14
<i>Miller v. Farm Bureau Town &amp; Country Ins. Co. of Missouri,</i> 6 S.W.2d 432 (Mo. App. S.D.1999).....	31
<i>Missouri Pac. Railroad Co. v. Rental Storage &amp; Transit Co.,</i> 524 S.W.2d 898 (Mo. App. S.D. 1975).....	30
<i>Monsanto Co. v. Gould Electronics, Inc.,</i> 965 S.W.2d 314 (Mo. App. E.D. 1998).....	15, 27, 31
<i>Parks v. Union Carbide Corp.,</i> 602 S.W.2d 188 (Mo. banc 1980).....	15
<i>Purcell Tire &amp; Rubber Co., Inc. v. Executive Beechcraft, Inc.,</i> 59 S.W.3d 505, 508 (Mo. banc. 2001).....	21
<i>RJF Int'l Corp. v. B.F. Goodrich, Co.</i> 880 S.W.2d 366 (Mo. App. E.D. 1994).....	30
<i>Slankard v. Thomas,</i> 912 S.W.2d 619,627 (Mo. App. S.D. 1995).....	15

**OTHER AUTHORITY**

§ 408.020, R.S.Mo..... 31, 33

Missouri Rules of Civil Procedure..... 32

## **JURISDICTIONAL STATEMENT**

Respondent/Cross-Appellant J.E. Dunn Construction Company (hereinafter "Dunn") requested transfer from the Western District Court of Appeals to the Supreme Court of Missouri, pursuant to Supreme Court Rules 83.04 and 83.05, after an Opinion of August 20, 2002 issued by the Western District Court of Appeals reversing and remanding the trial court's Judgment of June 14, 2001, which ordered that Defendant Starlight Theatre Association of Kansas City, Inc. (hereinafter "Starlight") was entitled to contractual indemnification from Dunn and that Dunn was entitled to contractual indemnification from Defendant P.C. Contractors, Inc. (hereinafter "PC Contractors"). (L.F., Vol. VII, pp. 919-922). Dunn had also cross-appealed the trial court's Judgment to the extent the trial court did not award Dunn the full amount of attorney's fees it requested from PC Contractors or pre-judgment interest, and provisionally appealed the trial court's Judgment against Dunn on Starlight's claim for contractual indemnification. (L.F., Vol. VII, p. 917).

Dunn requested transfer of the case so that this Court may resolve a split in authority that currently exists between the Eastern and Western District Court of Appeals on the issue of the proper interpretation and scope of a contractual agreement to indemnify for loss. Starlight also applied for transfer on the same issue. The Supreme Court sustained Dunn's and Starlight's respective Applications for Transfer by Order of November 26, 2002 and, therefore, the

Supreme Court has jurisdiction to address the issues created by the split in authority.

## STATEMENT OF FACTS

Dunn joins in the statement of facts submitted by PC Contractors in its Appellant's brief to the extent it sufficiently recounts the procedural history of this cause. Dunn provides the following facts to supplement PC Contractors' statement of facts in order to further explain the circumstances surrounding the litigation of this cause. Dunn also supplements PC Contractors' statement with facts that are pertinent to Dunn's cross-appeal.

Plaintiffs Zilma and Wayne Nusbaum filed suit against Defendants as a result of Plaintiff Zilma Nusbaum's July 11, 1996 fall on a sidewalk after attending an evening production at Starlight Theatre. (L.F., Vol. I, pp. 93-100). Plaintiff Zilma Nusbaum alleged that she tripped on a manhole cover that was elevated above the level of the sidewalk. *Id.* Plaintiff Zilma Nusbaum also alleged that she had not seen the manhole because of a missing light pole that had been knocked down by an employee of PC Contractors. (L.F., Vol. I, p. 95).

Plaintiffs sued the City of Kansas City, Missouri (hereinafter "City") as the owner of the property where Plaintiff Zilma Nusbaum fell. (L.F., Vol. V, pp. 570-577). Plaintiffs sued Starlight as the possessor of the sidewalk, for not warning patrons traveling between the theatre and the parking lots. *Id.* Plaintiffs sued Asphalt Plant Sales, Inc. (hereinafter "Asphalt") for its alleged negligence in the original installation of the manhole in the sidewalk. *Id.* Plaintiffs sued Dunn as the general contractor in charge of the Starlight Theatre Shirley Helzberg Project (hereinafter "the Project"). *Id.* Plaintiffs sued PC Contractors for its

employee's negligence in knocking over the light pole while performing subcontract work on the Project. *Id.*

On April 23, 1998, Dunn made an initial demand upon PC Contractors for indemnification pursuant to Section 4.6.1 of the contract the parties had previously executed. (L.F., Vol. V, pp. 631-634). Section 4.6.1 reads as follows:

#### 4.6 INDEMNIFICATION

**4.6.1.** To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect... from and against any claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 4.6. (L.F., Vol. V, pp. 612-613).

On July 7, 1999, July 10, 1999 and again on September 30, 1999, Dunn sent correspondence to PC demanding indemnification pursuant to Section 4.6.1 of the contract. (L.F., Vol. V, pp. 635-636, 640 and 642-643).



During a discovery deposition, Larry McDaniel, Operations Manager for PC Contractors, admitted that on May 24, 1996, Johnny Vaca, an employee of PC Contractors, tipped over a tractor-trailer end dump truck while working on the Project. (L.F., Vol. V, pp. 653). Mr. McDaniel further stated that as the dump truck fell over it hit and knocked down a light pole adjacent to the Project site and the manhole cover over which Plaintiff Zilma Nusbaum tripped. (L.F., Vol. V, p. 654). Mr. McDaniel admitted that Mr. Vaca parked the dump truck on unlevel ground and when Mr. Vaca was raising the trailer up, the dump truck tipped entirely over. (L.F., Vol. V, p. 653). Mr. McDaniel also admitted that Mr. Vaca should have been aware that the dump truck was not on level ground prior to attempting to raise the trailer and of the possibility that the dump truck might tip over. *Id.* Mr. McDaniel speculated that the elevated condition of the manhole relative to the sidewalk was caused by settling or the concrete not being poured properly, but, contrary to Appellant's Statement of Facts, never stated that the condition was not caused by an employee of PC Contractors while performing work on the Project. (L.F., Vol. V, p. 657).

After Plaintiffs had amended their Petition for the third and final time to include the various Defendants and assert their allegations against those Defendants, Plaintiffs entered into a series of independent settlements with PC Contractors, Dunn, and Starlight and the Circuit Court dismissed Plaintiffs' claims against each of these Defendants. (L.F. Vol. III, pp. 440-445). In addition, Plaintiffs claims against City were settled and subsequently dismissed

on July 12, 1999. (L.F., Vol. III, pp. 436-437). Finally, the Circuit Court granted Asphalt's Motion for Summary Judgment on July 7, 1999, thereby removing Asphalt from the lawsuit. (L.F., Vol. III, pp.434-435). After these series of events, the only issues that remained for the Circuit Court to decide involved Starlight's contractual indemnification claim against Dunn and Dunn's contractual indemnification claim against PC Contractors. (L.F., Vol. III, pp. 444-445). The Circuit Court granted Starlight's and Dunn's respective Motions for Summary Judgment on the indemnification issues and ordered a hearing on damages, which was held on November 30, 2000. (L.F. Vol. VI, pp. 753-758).

At the damages hearing, PC Contractors stipulated that the amount of Dunn's settlement with Plaintiffs, the amount of Starlight's settlement with Plaintiffs and the amount of the attorney's fees Dunn and Starlight sought to recover were reasonable. (Tr. 1). PC Contractors stated that it was only disputing whether it owed such amounts under the relevant indemnification provision. (Tr. 1).

After Starlight and Dunn submitted their written briefing to the Circuit Court on the sole issue of damages and PC Contractors responded in writing, the Court ordered that Starlight was entitled to recover from Dunn a total of \$68,994.77, which represented Starlight's total settlement with Plaintiffs of \$45,000.00 and \$23,994.97 in attorney's fees. Starlight had requested \$27,006.27 in attorney's fees and expenses. The Circuit Court also ordered that Dunn was entitled to recover from PC Contractors a total of \$95,194.77, which represented

Starlight's \$68,994.77 recovery against Dunn, Dunn's \$5,000.00 settlement with Plaintiffs, and \$21,200.00 in attorney's fees. Dunn had requested \$30,049.90 in attorney's fees and expenses. Both Starlight and Dunn had requested pre-judgment interest, but the Circuit Court only allowed post-judgment interest.

PC Contractors appealed the Circuit Court's June 14, 2001 Judgment and Starlight's and Dunn's respective cross-appeals followed. (L.F., Vol. VII, pp. 911-931). In an August 20, 2002 Opinion, The Western District Court of Appeals reversed the trial court's order granting summary judgment and remanded the case for further action consistent with its opinion. Dunn seeks this Court's ruling upholding the Circuit Court's grant of summary judgment on Dunn's contractual indemnity claim against PC Contractors. In addition, Dunn requests this Court hold that Dunn is entitled to the full amount of attorney's fees it requested from the Circuit Court, pre-judgment interest, and Dunn's attorney's fees incurred on its appeal to the Western District, as well as all attorney's fees Dunn has incurred and will incur as a result of the transfer of Dunn's appeal to this Court. Dunn also appealed the Circuit Court's grant of summary judgment in favor of Starlight Theatre; however, this point is provisional, in that the point will only be pursued if this Court upholds the Western District's reversal and remand of the judgment the trial court awarded Dunn against PC Contractors.

#### **POINTS RELIED ON**

- I. THE TRIAL COURT DID NOT ERR IN GRANTING DUNN'S MOTION FOR SUMMARY JUDGMENT ON DUNN'S

INDEMNIFICATION CLAIM AGAINST PC CONTRACTORS  
BECAUSE DUNN IS ENTITLED TO INDEMNIFICATION FROM PC  
CONTRACTORS FOR DEFENDING PLAINTIFFS' NEGLIGENCE  
CLAIMS AGAINST DUNN IN THAT:

- A. THE INDEMNIFICATION PROVISION IN THE SUBCONTRACT  
EXECUTED BY DUNN AND PC CONTRACTORS CLEARLY  
AND UNAMBIGUOUSLY PROVIDES FOR INDEMNIFICATION  
FOR ANY CLAIMS, DAMAGES, LOSS AND EXPENSES,  
INCLUDING ATTORNEY'S FEES, ARISING OUT OF OR  
RESULTING FROM PC CONTRACTORS' WORK, REGARDLESS  
OF WHETHER DUNN WAS NEGLIGENT; AND
- B. INDEMNIFICATION INCLUDES THE AMOUNT OF DUNN'S  
SETTLEMENT WITH PLAINTIFFS, THE ATTORNEY'S FEES  
AND EXPENSES DUNN INCURRED IN DEFENDING THE  
ACTION AND THE AMOUNT FOR WHICH DUNN MUST  
INDEMNIFY STARLIGHT.

*Buchanan v. Rentenbach Constructors, Inc.*, 922 S.W.2d 467 (Mo. App.  
E.D. 1996)

*Dillard v. Shaugnessy, Fickel & Scott Architects, Inc.* 884 S.W.2d 722  
(Mo.App. W.D. 1994)

*Parks v. Union Carbide Corp.*, 602 S.W.2d 188 (Mo. banc 1980)

*Purcell Tire & Rubber Co., Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d  
505, 508 (Mo. banc. 2001)

### **CROSS-APPEAL**

- II. THE TRIAL COURT ERRED IN NOT AWARDING DUNN THE FULL AMOUNT OF ATTORNEY'S FEES AND EXPENSES IT REQUESTED BECAUSE THE INDEMNIFICATION PROVISION CLEARLY AND UNAMBIGUOUSLY PROVIDES FOR THE RECOVERY OF ATTORNEY'S FEES AND EXPENSES DUNN INCURRED IN THAT DUNN INCURRED ATTORNEY'S FEES AND EXPENSES IN PURSUING INDEMNIFICATION FROM PC CONTRACTORS AS WELL AS IN DEFENDING PLAINTIFFS' CLAIMS FOR DAMAGES.

*Missouri Pac. Railroad Co. v. Rental Storage & Transit Co.*, 524 S.W.2d  
898 (Mo. App. S.D. 1975)

*RJF Int'l Corp. v. B.F. Goodrich, Co.*, 880 S.W.2d 366 (Mo. App. E.D.  
1994)

- III. THE TRIAL COURT ERRED IN NOT AWARDING DUNN PRE-JUDGMENT INTEREST BECAUSE, UNDER § 408.020, R.S.MO., DUNN IS ENTITLED TO THE INTEREST ACCRUED FROM APRIL 23, 1998 IN THAT DUNN NOTIFIED PC CONTRACTORS OF THE PENDING LAWSUIT AND DEMANDED INDEMNIFICATION FROM PC CONTRACTORS ON THAT DATE.

*Miller v. Farm Bureau Town & Country Ins. Co. of Missouri*, 6 S.W.2d

432 (Mo. App. S.D. 1999)

*Monsanto Co. v. Gould Electronics, Inc.*, 965 S.W.2d 314 (Mo. App. E.D. 1998)

§ 408.020 R.S.Mo.

- IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DUNN ON STARLIGHT'S CLAIM FOR INDEMNIFICATION BECAUSE STARLIGHT IS NOT ENTITLED TO INDEMNIFICATION FOR STARLIGHT'S DEFENSE OF PLAINTIFFS' DIRECT CLAIMS OF NEGLIGENCE AGAINST STARLIGHT IN THAT THE INDEMNIFICATION PROVISION DOES NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FOR INDEMNIFICATION FOR STARLIGHT'S OWN NEGLIGENCE.

#### ARGUMENT

- I. THE TRIAL COURT DID NOT ERR IN GRANTING DUNN'S MOTION FOR SUMMARY JUDGMENT ON DUNN'S INDEMNIFICATION CLAIM AGAINST PC CONTRACTORS BECAUSE DUNN IS ENTITLED TO INDEMNIFICATION FROM PC CONTRACTORS FOR DEFENDING PLAINTIFFS' NEGLIGENCE CLAIMS AGAINST DUNN IN THAT:

- A. THE INDEMNIFICATION PROVISION IN THE SUBCONTRACT EXECUTED BY DUNN AND PC CONTRACTORS CLEARLY AND UNAMBIGUOUSLY PROVIDES FOR INDEMNIFICATION FOR ANY CLAIMS, DAMAGES, LOSS AND EXPENSES, INCLUDING ATTORNEY'S FEES, ARISING OUT OF OR RESULTING FROM PC CONTRACTORS' WORK, REGARDLESS OF WHETHER DUNN WAS NEGLIGENT; AND**
- B. INDEMNIFICATION INCLUDES THE AMOUNT OF DUNN'S SETTLEMENT WITH PLAINTIFFS, THE ATTORNEY'S FEES AND EXPENSES DUNN INCURRED IN DEFENDING THE ACTION AND THE AMOUNT FOR WHICH DUNN MUST INDEMNIFY STARLIGHT.**

### **Standard of Review**

Appellate review of the Circuit Court's grant of summary judgment is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "The propriety of summary judgment is purely an issue of law." *Id.* "[A]n appellate court need not defer to a trial court's order granting summary judgment." *Id.* Summary judgment is appropriate in a contract claim when the language of the contract is

clear and unambiguous in its construction. *Slankard v. Thomas*, 912 S.W.2d 619,627 (Mo. App. S.D. 1995). Courts consider the relative bargaining position of the parties an important factor in construing a contract. *Monsanto Co. v. Gould Electronics, Inc.*, 965 S.W.2d 314, 316 (Mo. App. E.D. 1998).

**A. The indemnification provision in the subcontract executed by Dunn and PC Contractors clearly and unambiguously provides for indemnification for any claims, damages, loss and expenses, including attorney's fees, arising out of or resulting from PC Contractors' work, regardless of whether Dunn was negligent.**

This transfer involves the proper construction, under Missouri law, of the respective indemnification provisions at issue in order to resolve a split in authority between the Eastern and Western District Court of Appeals. A contractual agreement to indemnify for loss caused by the indemnitee must be stated in clear and unequivocal terms. *Parks v. Union Carbide Corp.*, 602 S.W.2d 188, 190 (Mo. banc 1980). An indemnity contract is still interpreted under the rules of general contract principles, and thus the words in an indemnification contract should be construed to achieve the apparent purpose of the parties. *Id.* Missouri law holds that indemnification contracts are usually intended to provide against the loss or liability of the indemnitee caused by conditions that are under the control of the indemnitor over which the indemnitee has no control. *Id.*

In the subcontract PC Contractors entered into with Dunn, PC Contractors clearly and unequivocally agreed to indemnify and hold harmless Dunn and



Starlight from and against any claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of PC Contractors' work. The indemnification provision includes a clause which states that in order for PC Contractors' indemnification obligation to arise, the claim or damage asserted against Dunn had to be caused in whole or in part by the negligent acts or omissions of PC Contractors, regardless of whether or not the claim or damage was caused in part by Dunn's or Starlight's own negligence or alleged negligence.

The Western District, applying Kansas law, has concluded that certain contractual agreements for indemnification, such as the agreement at issue in this case, should be interpreted as limiting an indemnitor's liability to those losses caused by the negligence of the indemnitor regardless of any claimed liability on the part of the indemnitee.<sup>1</sup> *Dillard v. Shaugnessy, Fickel & Scott Architects, Inc.*, 884 S.W.2d 722 (Mo.App. W.D. 1994). However, interpreting an

---

<sup>1</sup> In *Dillard*, after the trial court granted summary judgment in favor of the indemnitees (architects and engineers in a construction project) and against the Plaintiff employee of a subcontractor who was injured while working on the job site, the indemnitees filed cross-claims against the General Contractor seeking contractual indemnification for attorney's fees incurred in defending the action by the subcontractor's employee. Therefore, since the indemnitees were not found liable to the employee, their indemnification claim did not include any settlement

indemnification provision very similar to the provision at issue in this case, the Missouri Court of Appeals, Eastern District ruled that a contractual agreement for indemnification requires a subcontractor to indemnify a contractor for the contractor's own negligence. *Buchanan v. Rentenbach Constructors, Inc.*, 922 S.W.2d 467 (Mo.App. E.D. 1996).

In its initial appeal, PC Contractors argued that Dunn is not entitled to indemnification from PC Contractors for Dunn's own negligent acts based on the language of the indemnification provision at issue. In support of that argument, PC Contractors cited four cases, including *Dillard*, that each involved issues regarding the interpretation of indemnification language similar to the language of the indemnification provisions at issue in the present lawsuit. The Western District agreed with PC Contractors' argument and specifically relied upon *Dillard* in reaching its decision, although none of the decisions PC Contractors cited are based upon the application of Missouri law.

In its Opinion in the present lawsuit, the Western District expressly rejected the Eastern District's rationale and holding in *Buchanan*. In *Buchanan*, the Eastern District applied Missouri law in interpreting an indemnification provision. *See Buchanan*, 922 S.W.2d at 470. Therefore, the Eastern District's ruling in *Buchanan* is binding authority that controls the interpretation issues presented in the present lawsuit. PC Contractors has argued that "[e]very appellate court that has interpreted the AIA indemnification clause at issue here

---

amount or verdict involving liability. *Dillard*, 884 S.W.2d at 723.

has rejected Dunn's interpretation." However, in *Buchanan*, the Eastern District of the Missouri Court of Appeals expressly rejected PC Contractors' argument.

In *Buchanan*, a general contractor filed a third-party petition against a subcontractor for indemnification in response to a negligence suit filed by an employee of the subcontractor. *See Buchanan*, 922 S.W.2d at 469. The general contractor sought indemnification for all sums to be paid to the subcontractor's employee. *Id.* As cited by the court, the relevant indemnification provision stated in pertinent part:

12.1 To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless...the Contractor...from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that:

(a) any such claims, damage, loss, or expense is attributable to bodily injury, sickness, disease, death, or to injury to or destruction of tangible property (other than Subcontractor's Work itself) including the loss of use resulting therefrom, to the extent caused or alleged to be caused in whole or part by an [sic] negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party to be indemnified hereunder:

(b) such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation to indemnify which would otherwise exist as to any party or person described in this Article 12. *Id.*

The subcontractor argued that the agreement between it and the general contractor did not contain a clear and unequivocal provision for it to indemnify the general contractor when the claims were based solely on the general contractor's negligence.<sup>2</sup> *Buchanan*, 922 S.W.2d at 469. The court disagreed with the subcontractor's argument "that the agreement between it and [the general contractor] did not contain clear and unequivocal language requiring it to indemnify [the general contractor] for [the general contractor's] own negligent acts." *Id.* at 470. The appellate court held that the trial court improperly dismissed the general contractor's third-party petition for indemnification from the subcontractor because the indemnification provision contained a clear and unequivocal duty for the subcontractor to indemnify the general contractor for claims or damages asserted against the general contractor, regardless of whether the claims or damages were caused in part by the general contractor. *Id.* at 470-71.

*Dillard* involved an indemnification provision similar in language to the provision at issue in *Buchanan*. As quoted by the Western District, the indemnification provision involved in *Dillard* stated in pertinent part:

### 3.18 INDEMNIFICATION

---

<sup>2</sup> The subcontractor's employee had not sued the subcontractor; rather, the

3.18.1 To the fullest extent permitted by law, the Contractor [Huber] shall indemnify and hold harmless the Owner, Architect [SFS], Architect's consultants [SEA], and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expenses is caused in part by a party indemnified hereunder [e.g. SFS and SEA]. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18. *Dillard*, 884 S.W.2d at 724.<sup>3</sup>

---

subcontractor became part of the suit as a third-party defendant.

<sup>3</sup> The use of "if" in the portion of the indemnification provision that states,

"...loss or expense if attributable to bodily injury..." appears to be a

typographical error that should read "is" in order for that portion to read logically.

If the quoted language is not a typographical error, it seems likely that the parties in *Dillard* intended to use "is" rather than "if" based on the need for a logical

The indemnification provisions in *Dillard* and *Buchanan* are nearly identical in language and the differences that do exist are not material to the proper interpretation of those provisions under Missouri law. However, as mentioned, the Eastern and Western Districts' respective interpretations of the indemnification provisions in those cases are in conflict with respect to whether the relevant parties intended the indemnitor's obligation to include indemnification for the indemnitee's own negligence. The Eastern District, in applying Missouri law, correctly concluded that the relevant provision clearly and unequivocally intended for indemnification of the indemnitee's own negligence, considering the express language used and the status and relationship of the parties to the agreement.

As a matter of law, "sophisticated parties have freedom of contract—even to make a bad bargain, or to relinquish fundamental rights." *Purcell Tire & Rubber Company, Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. banc. 2001). In other words, two sophisticated commercial entities such as PC Contractors and Dunn have every right to reach an agreement regarding the scope of indemnification between them and the extent to which each party will bear the risk of certain losses. As a matter of public policy, the right and ability to do so creates certainty as to the entities' respective indemnification obligations at the outset of the contractual relationship, which necessarily allows each entity to allocate its resources based on the risk shifted by agreement in order to ensure that the contract

---

reading and similar provisions found in other cases.

objectives are successfully and efficiently accomplished. For example, through a certain and agreed upon understanding of the scope of the respective indemnification obligations, each party is able to procure the insurance necessary to cover its contractual obligations in the event of loss.

The Western District's interpretations of the indemnification provisions at issue in *Dillard* and the present lawsuit create an unnecessary complexity in applying an otherwise clear and unequivocal indemnification provision by requiring a trial court to compare fault, a duty routinely required of a jury, in order to determine the extent to which the indemnitor's negligence actually caused injury or damage. Such a requirement effectively destroys the desirable and necessary level of certainty inherent in the Eastern District's interpretation expressed in *Buchanan*. Following the Western District's approach, where liability is at issue in a case, parties to an indemnification provision can expect to participate in litigation in order to determine their respective indemnification obligations. The only certainty involved with such an approach rests in the knowledge that the parties will necessarily incur legal fees and associated expenses to determine their rights and obligations. In contrast, the parties will be completely uncertain at the inception of their contractual relationship as to the extent of each party's potential liability in the event of loss, despite joint efforts to determine and express the scope of their indemnification obligations early in their relationship.

Even assuming the Western District properly interpreted the language of the indemnification provision at issue in *Dillard*, which Dunn denies, the language of

the indemnification provision at issue in the present lawsuit contains a material distinction from the provisions of *Dillard* and *Buchanan*, such that the Western District did not reach the proper interpretation in the present lawsuit and improperly reversed the trial court's judgment in favor of Dunn. The indemnification provision at issue in the present lawsuit does not contain the language of *Dillard* that reads, "provided that such claim, damage, loss or expense if attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property...including loss of use resulting therefrom." In fact, reference to the subject indemnification provision clearly indicates that the parties intentionally struck "provided that" language from the indemnification provision included in the final contract between them. (See L.F., Vol. V, p. 612). The intentional lack of the "provided that" language in the provision between Dunn and PC Contractors arguably requires an interpretation that permits indemnification for Dunn's own negligence and shows that Dunn and PC Contractors intended for such an interpretation.

In *Dillard*, since the "but only to the extent...for whose acts they may be liable" phrase immediately follows the "provided that" language, the "but only" phrase arguably qualifies the "provided that" language. Accordingly, when read in conjunction, those phrases arguably require a causal connection between the indemnitor's conduct and the claimed injury that is not required in the absence of the "provided that" language. Assuming the Western District correctly interpreted the *Dillard* provision, both of the following must be present in order for the



indemnification obligation to arise: (1) claim, damage, loss or expenses attributable to one or more of the types of loss listed in the indemnification provision, such as personal injury, and (2) a causal connection between the injury (physical or property damage) and the negligent acts or omissions of the indemnitor. In other words, the “but only to the extent” language in *Dillard* qualifies the “provided that” language, such that a fault comparison is required in order to determine the extent of the indemnitor’s indemnification obligation.

The absence of the “provided that” language in the subject indemnification provision arguably negates the required causal connection between PC Contractors’ conduct and the type of loss at issue, i.e. Plaintiffs’ alleged injuries, such that no fault comparison is necessary to trigger the indemnification obligation. Rather, the “but only to the extent” language of the subject provision arguably qualifies the scope of the indemnification obligation expressed before the “but only to the extent” language by requiring that Plaintiffs’ claims against Dunn arose out of PC Contractors’ conduct. In other words, the relevant issue is whether PC Contractors’ conduct triggered, i.e. caused, Plaintiffs to bring the lawsuit against Dunn. Based on such a reading, PC Contractors must indemnify Dunn for Plaintiffs’ claims against Dunn if those claims would not have been brought but for the fact that PC Contractors’ employee knocked down the light pole in breach of its duty to ensure ordinary care.

Without the “provided that” language, the subject indemnification provision does not require a determination that PC Contractors’ conduct actually caused

Plaintiffs' alleged injuries, which would arguably require a fault comparison as decided by the Western District. Therefore, even assuming the Western District reached the correct ruling in *Dillard*, which Dunn denies, that ruling does not properly control this Court's interpretation of the subject indemnification provision. Accordingly, the subject indemnification provision only requires that Plaintiffs' claims were brought because of PC Contractors' conduct.

In sum, in *Buchanan*, the Eastern District has properly applied Missouri law in determining that language of an indemnification provision similar in all material respects to the subject provision clearly and unequivocally requires PC Contractors to indemnify Dunn for Plaintiffs' claims against Dunn, since PC Contractors' conduct caused Plaintiffs to bring suit against Dunn, regardless of whether Dunn's conduct also caused Plaintiffs to bring suit against Dunn. Alternatively, even assuming the Western District's decision in *Dillard* is correct, the absence of any language in the subject provision similar to the "provided that" language of the *Dillard* provision is materially different, such that *Dillard* does not control this Court's ruling.

**B. Indemnification includes the amount of Dunn's Settlement with Plaintiffs, the attorney's fees and expenses Dunn incurred in defending the action and the amount for which Dunn must indemnify Starlight.**

Based on the conclusion that PC Contractors is obligated to indemnify Dunn for Dunn's own negligent acts as well as PC Contractors' negligent acts, the

indemnity provision provides for recovery of Dunn's settlement with Plaintiffs, the attorney's fees and expenses Dunn incurred in defending the lawsuit and the amount for which Dunn must indemnify Starlight.

**(1) Settlement Amounts**

PC Contractors contends that Dunn's settlement with Plaintiffs only covers Plaintiffs' claims against Dunn for Dunn's independent acts of negligence, which are not covered under the relevant indemnification provision, and, therefore, PC Contractors is not obligated to indemnify Dunn for the settlement amount. The same argument applies to Starlight's settlement with Plaintiffs, for which the trial court ordered Dunn to indemnify Starlight. In turn, since the trial court's award to Dunn includes Starlight's settlement with Plaintiffs, PC Contractors is required to indemnify Dunn for that amount.

Dunn's recovery of its settlement with Plaintiffs does not depend upon the nature of Dunn's settlement with Plaintiffs or the associated release, because, as previously discussed, this Court should adopt the interpretation the Eastern District set forth in *Buchanan* as the controlling law in Missouri. Accordingly, the subject indemnification provision clearly and unequivocally indicates that PC Contractors agreed to indemnify Dunn for Dunn's own negligent acts. Further, Dunn cannot unilaterally alter the indemnification provision through any settlement or release it entered into with Plaintiffs, and PC Contractors has cited no law or authority in support of its argument concerning the releases. Therefore, it is irrelevant that Plaintiffs alleged that Dunn was negligent for failing to repair the light pole,

because Plaintiffs also alleged negligence on the part of PC Contractors and Larry McDaniel subsequently admitted PC Contractors' negligence. Because PC Contractors was at least negligent in part, PC Contractors must indemnify Dunn as provided for in the agreed upon subcontract. According to the holding in *Buchanan*, the indemnification provision requires indemnification for Dunn's settlement with Plaintiffs regardless of whether the settlement covers Plaintiffs' claims against Dunn for Dunn's alleged negligence. Therefore, the trial court did not err in entering judgment in favor of Dunn and requiring PC Contractors to indemnify Dunn for its \$5,000 settlement with Plaintiffs and Starlight's \$45,000 settlement with Plaintiffs.

**(2) Attorney's Fees and Expenses Incurred in Defense of the Lawsuit**

PC Contractors argues that Dunn and Starlight are not entitled to the amount of attorney's fees incurred in defending against Plaintiffs' "direct" claims of negligence. In other words, PC Contractors contends that it is only obligated under the subcontract to indemnify Dunn for those attorney's fees Dunn incurred in defending against Plaintiffs' negligence claims made against PC Contractors.

An "indemnitee has the right to recover attorney's fees reasonably incurred in the defense of a claim, provided the indemnitor has notice of the lawsuit and an opportunity to defend." *Monsanto Co. v. Gould Electronics, Inc.*, 965 S.W.2d 314, 318 (Mo.App.E.D. 1998). Dunn initially demanded indemnification from PC Contractors on April 23, 1998, at which time Dunn informed PC Contractors of the

pending lawsuit filed by Plaintiffs. Therefore, PC Contractors received notice of the lawsuit on April 23, 1998.

As previously shown, Dunn is entitled to recover under the relevant indemnification provision for defending Plaintiffs' claims, which arose out of and resulted from PC Contractors' admitted negligence, regardless of whether Dunn was also negligent. Therefore, Dunn is entitled to attorney's fees reasonably incurred in defending Plaintiffs' claims, whether or not those fees and expenses are attributed to Dunn's defense of Plaintiffs' direct negligence claims against Dunn or Plaintiffs' negligence claims against PC Contractors.

### **Conclusion**

Parties to a contract may agree that the indemnitor will be indemnified for its own negligent acts if the relevant provisions provide for such treatment in clear and unequivocal terms. The Eastern District's interpretation in *Buchanan* indicates that the indemnification provision that PC Contractors and Dunn agreed upon clearly and unequivocally requires PC Contractors to indemnify Dunn for defending Plaintiffs' claims, regardless of whether Plaintiffs' claims or damages were caused in part by Dunn's own negligence. The Eastern District applied Missouri law in reaching its decision in *Buchanan*, unlike the Western District in *Dillard*. Furthermore, even if the Western District's interpretation is correct, the subject indemnification provision is materially different than the provision at issue in *Dillard* and, therefore, *Dillard* does not control the correct construction of the provision at issue in the present lawsuit. The trial court did not err in granting

Dunn's Motion for Summary Judgment and requiring PC Contractors to indemnify Dunn for Dunn's settlement with Plaintiffs, Starlight's settlement with Plaintiffs and the attorney's fees and expenses Dunn incurred in defending the lawsuit.

To restate what the parties agreed to and intended to happen in these circumstances, if PC Contractors' negligence caused Plaintiffs to bring suit against Dunn, then PC Contractors is required to indemnify Dunn for Plaintiffs' claims against Dunn, even though Plaintiffs alleged Dunn was also negligent in some respect. In other words, if PC Contractors' employee had not tipped over the dump truck and negligently knocked over the light pole, then Plaintiffs would not have had grounds to bring suit against Dunn for Dunn's alleged negligence in failing to repair the condition caused by PC Contractors' negligence and PC Contractors' duty to indemnify Dunn as expressed in the subcontract would not have arose. The Circuit Court's ruling followed Missouri law and correctly enforced the intent of the parties to the contract. The Circuit Court did nothing more than require PC Contractors to live up to the bargain it entered into with Dunn.

### **CROSS-APPEAL**

**II. THE TRIAL COURT ERRED IN NOT AWARDING DUNN THE FULL AMOUNT OF ATTORNEY'S FEES AND EXPENSES IT REQUESTED BECAUSE THE INDEMNIFICATION PROVISION CLEARLY AND UNAMBIGUOUSLY PROVIDES FOR THE RECOVERY OF ATTORNEY'S FEES AND EXPENSES DUNN INCURRED IN THAT DUNN INCURRED ATTORNEY'S FEES**

**AND EXPENSES IN PURSUING INDEMNIFICATION FROM PC CONTRACTORS, AS WELL AS IN DEFENDING PLAINTIFFS' CLAIMS FOR DAMAGES.**

The indemnity provisions in this case are similar to the provisions in *RJF Int'l Corp. v. B.F. Goodrich, Co.*, 880 S.W.2d 366 (Mo. App. E.D. 1994). In *RJF Int'l*, the Court of Appeals held that the party seeking indemnification was entitled to attorney's fees and expenses incurred pursuing indemnity. 880 S.W.2d at 371-72. PC Contractors relies upon *Missouri Pac. Railroad Co. v. Rental Storage & Transit Co.*, 524 S.W.2d 898 (Mo. App. S.D. 1975), for its position that Starlight and Dunn are not entitled to attorney's fees incurred pursuing indemnity. However, *Missouri Pac. Railroad* does not rely upon Missouri precedent, but rather cites to the decision of a federal district court sitting in Virginia. 524 S.W.2d at 912. Further, the appellate court did not explain the rationale behind its decision in *Missouri Pac. Railroad*. *RJF Int'l* is the better-reasoned and more recent authority, and it should serve as precedent in Missouri law.

Under the relevant indemnification provision, Dunn is entitled to recover from PC Contractors the damages it has suffered as a result of PC Contractors' breach of the subcontract it entered into with Dunn. Such recovery includes the attorney's fees and expenses Dunn incurred in seeking judicial enforcement of the terms of the indemnity provision. Therefore, the trial court erred in not awarding Dunn the full amount of attorney's fees and expenses it requested, which include

fees and expenses Dunn incurred in pursuing indemnification, as well as in defending against Plaintiffs' claims.

**III. THE TRIAL COURT ERRED IN NOT AWARDING DUNN PRE-JUDGMENT INTEREST BECAUSE, UNDER § 408.020, R.S.MO., DUNN IS ENTITLED TO THE INTEREST ACCRUED FROM APRIL 23, 1998 IN THAT DUNN NOTIFIED PC CONTRACTORS OF THE PENDING LAWSUIT AND DEMANDED INDEMNIFICATION FROM PC CONTRACTORS ON THAT DATE.**

The trial court awarded Dunn post-judgment interest. Pursuant to §408.020, R.S.Mo., Dunn is also entitled to 9% pre-judgment interest from April 23, 1998, the date Dunn made demand upon PC Contractors to indemnify Dunn.

Section 408.020 allows creditors to recover pre-judgment interest on liquidated claims after the claims become due and payable and the creditor demands payment. *Monsanto*, 965 S.W.2d at 318. In *Miller v. Farm Bureau Town & Country Ins. Co. of Missouri*, the Court stated that an insurance policyholder was entitled to pre-judgment interest under § 408.020, "though the parties to the dispute have not agreed upon the amount due under the policy." 6 S.W.2d 432, 440 (Mo. App. S.D. 1999).

While *Miller* involved a dispute between an insurance company and a policyholder, the Court's conclusion properly applies to Dunn's claim for pre-judgment interest because there is no significant difference in Dunn and PC



Contractors' relationship and the relationship between the parties in *Miller* that would preclude applying the Court's conclusion in *Miller*. When Dunn initially demanded indemnification from PC Contractors on April 23, 1998, they had not agreed upon the amount for which PC Contractors was obligated to indemnify Dunn. Further, Dunn and PC Contractors would not have been able to ascertain an amount at the time Dunn initially demanded indemnification. However, PC Contractors had the ability to limit its exposure by agreeing to defend and indemnify Dunn, as it was contractually obligated to do so.

### **Conclusion**

In addition to the amounts the trial court awarded Dunn, Dunn is entitled to recover the attorney's fees and expenses it incurred in pursuing indemnification and the pre-judgment interest that accrued from April 23, 1998. Therefore, Dunn requests that this Court, pursuant to Missouri Rule of Civil Procedure 84.14, amend the Circuit Court's judgment, overrule the Western District's ruling on these issues and award Dunn (1) the full amount of attorney's fees and expenses, \$30,049.90, and pre-judgment interest it initially requested, (2) the attorney's fees and expenses it incurred on appeal and (3) the attorney's fees and expenses it incurred as a result of pursuing transfer of the case to this Court. In the alternative, if this Court cannot amend the Circuit Court's judgment and overrule the Western District's ruling on these issues, then Dunn requests that this Court reverse the trial court's decision to not award Dunn the full amount of attorney's fees and expenses it incurred in defending Plaintiffs' claims and pursuing

indemnification and pre-judgment interest, and remand the case for the Circuit Court to award Dunn the remaining \$8,849.90 in attorney's fees and expenses it requested as well as pre-judgment interest under § 408.020.

**IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST DUNN ON STARLIGHT'S CLAIM FOR INDEMNIFICATION BECAUSE STARLIGHT IS NOT ENTITLED TO INDEMNIFICATION FOR STARLIGHT'S DEFENSE OF PLAINTIFFS' DIRECT CLAIMS OF NEGLIGENCE AGAINST STARLIGHT IN THAT THE INDEMNIFICATION PROVISION DOES NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FOR INDEMNIFICATION FOR STARLIGHT'S OWN NEGLIGENCE.**

This point is provisional, in that it will only be pursued if the Supreme Court sustains the Court of Appeals' reversal of the trial court's judgment in favor of Dunn and against PC Contractors. The trial court's judgment in favor of Starlight and against Dunn parallels Dunn's judgment against PC Contractors, because the indemnification provisions both require indemnity for the indemnitee's own negligence.

Starlight's indemnification provision with Dunn reads as follows:

**3.18 INDEMNIFICATION**

3.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and

expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18. (Supplemental L.F. p. 10).

The trial court relied upon the same rationale in interpreting the indemnification provisions and ruling in favor of Starlight and Dunn on each parties' indemnification claims. The trial court's ruling inextricably joins Starlight and Dunn, in the sense that if Dunn is not entitled to indemnification from PC Contractors, then Starlight is not entitled to indemnification from Dunn.

Therefore, only if this Court sustains the Court of Appeals' reversal of the trial court's judgment in favor of Dunn on Dunn's indemnification claim against PC Contractors, does Dunn request this Court sustain the Court of Appeals' reversal of the trial court's granting of summary judgment in favor of Starlight on Starlight's indemnification claim against Dunn.

## **CONCLUSION**

The indemnification provision set forth in the subcontract executed by Dunn and PC Contractors clearly and unambiguously obligates PC Contractors to indemnify Dunn for any and all claims or damages arising out of or resulting from the performance of PC Contractors' work if the claims or damages were caused in whole or in part by the negligent acts of PC Contractors. PC Contractors has admitted its negligence. The Eastern District of the Missouri Court of Appeals has determined that the indemnification language requires PC Contractors to indemnify Dunn regardless of whether Dunn's negligence also caused Plaintiffs' claims or damages.

Dunn requests that this Court overrule the Western District Court of Appeals' reversal of the Circuit Court's grant of summary judgment in favor of Dunn on Dunn's contractual indemnity claim against PC Contractors. In addition, Dunn requests this Court hold that Dunn is entitled to the full amount of attorney's fees it requested from the Circuit Court, pre-judgment interest, and Dunn's attorney's fees incurred on appeal and on transfer. Dunn also requests that this Court sustain the Western District Court of Appeals' reversal of the Circuit Court's grant of summary judgment in favor of Starlight Theatre; this point is provisional, however, in that it only will be pursued if this Court sustains the Western District Court of Appeal's reversal of the trial court's judgment in favor of Dunn against PC Contractors.

Respectfully submitted,

---

David R. Buchanan #29228

Scott A. Hunter #46518

BROWN & JAMES, P.C.

1100 Main Street, Suite 1900

Kansas City, Missouri 64105-2153

Telephone: (816) 472-0800

Facsimile: (816) 421-1183

**Attorneys for Respondent/Cross-  
Appellant J.E. Dunn Construction  
Company**

## **CERTIFICATE OF COMPLIANCE AND SERVICE**

COMES NOW, the undersigned attorney for Respondent/Cross-Appellant J.E. Dunn Construction Company, on this 3rd day of January, 2003, and hereby certifies pursuant to Rule 84.06(c) the following:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. This brief contains 7,484 words according to statistics compiled by the Microsoft Word program.
4. Pursuant to Rule 84.06(g), a Microsoft Word file containing this Brief is being submitted on a floppy disk, which has been scanned for viruses and is virus-free.
5. Two (2) copies of this brief have been mailed, postage prepaid, to each of the following:

Steven G. Piland  
PILAND & MAGRUDER  
2405 Grand Blvd., Suite 490  
Kansas City, Missouri 64108-2519  
Telephone: (816) 474-7055  
**Attorney for Appellant/Cross-Respondent  
PC Contractors, Inc.**

Melodie A. Powell  
EVANS & DIXON  
1100 Main Street, Suite 2000  
Kansas City, Missouri 64105-2119  
Telephone: (816) 472-4600  
**Attorney for Respondent/Cross-Appellant  
Starlight Theatre**

---

David R. Buchanan               #29228  
Scott A. Hunter               #46518  
**BROWN & JAMES, P.C.**  
1100 Main Street, Suite 1900  
Kansas City, Missouri 64105-2153  
Telephone: (816) 472-0800  
Facsimile: (816) 421-1183  
**Attorneys for Respondent/Cross-  
Appellant J.E. Dunn Construction  
Company**